

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIACALIFORNIA DEPARTMENT OF  
TOXIC SUBSTANCES CONTROL,

Plaintiff,

No. C 05-3150 PJH

v.

FREUD F. FARLEY and KARL C.  
KLUCK,**ORDER GRANTING SUMMARY  
ADJUDICATION IN PART AND  
DENYING SUMMARY ADJUDICATION  
IN PART**

Defendants.

Plaintiff's motion for summary adjudication came on for hearing before this court on September 6, 2006. Plaintiff, California Department of Toxic Substances Control ("plaintiff") appeared through its counsel, Rose B. Fua and Jamie Jefferson. Defendants, Freud F. Farley and Karl C. Kluck ("defendants"), appeared through their respective counsel, James Hanavan. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS plaintiff's motion for summary adjudication in part, and DENIES the motion in part, for the reasons stated at the hearing, and as follows.<sup>1</sup>

**BACKGROUND**

This case arises under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601. Defendants purchased a property located in the Hunter's Point district of San Francisco in 1984. See Complaint for Recovery of

<sup>1</sup> As an initial matter, the court notes that defendants have included footnotes in their papers that violate this court's Local Rules and case management order, both of which require that all footnote text be of the same font size as text contained in the body of defendants' argument. Although the court will consider defendants' footnotes for purposes of the instant motion, defendants are hereby placed on notice that failure to follow the above rule in future will result in the court striking all footnotes from the record.

1 Response Costs, Declaratory Relief (“Complaint”), ¶ 4. Prior to the purchase, the property  
2 had been used for years as a drum recycling and disposal facility, and it continued to be so  
3 used after defendants purchased the property. See Complaint, ¶¶ 9-10.

4 Plaintiff, the California Department of Toxic Substances Control and its predecessor  
5 entities (“plaintiff”), began inspecting the property in 1980, prior to defendants’ purchase of  
6 the property, which inspections continued throughout the years subsequent to defendants’  
7 purchase of the property, through the 1990s. Id. at ¶¶ 11-19. Those numerous inspections  
8 revealed that the soil and groundwater of the property were contaminated with numerous  
9 hazardous substances, and that the contamination had affected the adjacent properties.

10 Id.

11 As a result of plaintiff’s multiple inspections and testing, plaintiff sought to remove  
12 the offending substances from the property and to remediate the property in order to  
13 eliminate all contamination. This process, which began with the above testing in the 1980s,  
14 continued up until 2003, when the property was finally declared contamination free. In  
15 order to conduct the removal and remediation of the property throughout the years, plaintiff  
16 sued and secured the participation of approximately 65 potentially responsible parties  
17 (“PRP’s), who had used the property for drum disposal activities over the years. Id. at ¶¶  
18 24, 26, 29. Ultimately, those PRPs agreed – through a Consent Order – to pay for  
19 response costs at the property. See Complaint, ¶ 32. Defendants, however, were not  
20 participants to the prior Consent Order, and have never participated in plaintiff’s removal  
21 and remediation efforts, aside from undertaking limited action in response to plaintiff’s  
22 request that defendants make access to the site possible. Id. at ¶ 33.

23 On August 3, 2005, plaintiff filed the instant action against defendants. The action  
24 alleges one CERCLA claim seeking recovery of the response costs (both removal and  
25 remedial costs) that plaintiff incurred with respect to the property. See generally,  
26 Complaint. Defendants filed an answer to plaintiff’s complaint on October 6, 2005. See  
27 generally, Answer to Complaint for Recovery of Response Costs and Declaratory Relief

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1 ("Answer"). In their answer, defendants assert twelve affirmative defenses. See id.

2 Plaintiff now moves for summary adjudication on the question of defendants' liability  
3 under CERCLA. Specifically, plaintiff seeks a ruling establishing that defendants are jointly  
4 and severally liable for response costs incurred by plaintiff in conducting and overseeing  
5 the remediation of defendants' property. Defendants also make a passing request, in their  
6 opposition brief, to re-open discovery pursuant to Federal Rule of Civil Procedure ("FRCP")  
7 56(f).<sup>2</sup>

## 8 DISCUSSION

### 9 A. Legal Standard

10 Courts apply the same standards to summary adjudication motions as with summary  
11 judgment motions, which are granted if "the pleadings, depositions, answers to  
12 interrogatories, and admissions on file, together with the affidavits, if any, show that there is  
13 no genuine issue as to any material fact and that the moving party is entitled to judgment  
14 as a matter of law." FRCP 56(c). Material facts are those which may affect the outcome of  
15 the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to  
16 a material fact is genuine if there is sufficient evidence for a reasonable jury to return a  
17 verdict for the nonmoving party. Id. The court must view the facts in the light most  
18 favorable to the non-moving party and give it the benefit of all reasonable inferences to be  
19 drawn from those facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
20 587 (1986).

### 21 B. Scope of Plaintiff's Motion

22 Preliminarily, the court must address issues related to the scope of plaintiff's motion.  
23 Plaintiff's motion papers seek a summary adjudication ruling with respect to plaintiff's  
24 CERCLA cause of action, as well as with respect to all twelve of defendants' affirmative

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26 <sup>2</sup> Both parties have also concurrently filed: (1) requests for judicial notice (both  
27 parties); (2) objections to evidence (defendants only); and (3) a request to strike the objections  
28 to evidence (plaintiff only). The court hereby: (1) GRANTS the parties' requests for judicial  
notice; (2) OVERRULES defendants' objections to evidence; and (3) DENIES plaintiff's motion  
to strike defendants' objections to evidence.

1 defenses. See Op. Br. at 3:2; 13-17. Defendants take issue with this, and argue that  
2 plaintiff's notice of motion fails to properly place defendants' affirmative defenses before the  
3 court for resolution.

4 The court finds that, as a procedural matter, plaintiff's notice of motion and  
5 corresponding memorandum of points and authorities sufficiently places defendants on  
6 notice that plaintiff is seeking a ruling with respect to defendants' affirmative defenses in  
7 addition to the CERCLA cause of action, and that these defenses are therefore properly  
8 before the court. In so ruling, the court notes that defendants had ample opportunity to  
9 respond to plaintiff's affirmative defense arguments in their opposition, and did so, although  
10 defendants chose to focus their arguments on fewer than the twelve affirmative defenses  
11 raised in plaintiff's opening motion.

12 Notwithstanding that the scope of plaintiff's motion includes defendants' affirmative  
13 defenses, however, the court finds that the majority of the affirmative defenses raised by  
14 plaintiff relate to damages issues, rather than liability. And since plaintiff admittedly seeks  
15 summary adjudication of all issues related to CERCLA liability only – and defendants have  
16 engaged in a thorough and adequate briefing of those issues – the court's ruling is  
17 therefore confined to those affirmative defenses that go directly to the issue of defendants'  
18 liability under CERCLA.

19 Accordingly, the court's order addresses the following issues: (1) whether the  
20 requirements for the imposition of liability on defendants are satisfied under CERCLA; and  
21 (2) the validity of defendants' third, fourth, seventh, ninth, and tenth affirmative defenses, all  
22 of which bear directly on defendants' CERCLA liability.

23 C. CERCLA Liability

24 To establish a *prima facie* case to recover its response costs from defendants under  
25 CERCLA, the government has to prove: (1) the site at issue is a "facility"; (2) a "release" or  
26 "threatened release" of a hazardous substance occurred; (3) the government incurred costs  
27 in responding to the release or threatened release; and (4) the defendants are the liable  
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1 party. See 42 U.S.C. § 9607; see also *U.S. v. Chapman*, 146 F.3d 1166, 1169 (9th Cir.  
2 1998); *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1152-53 (9th Cir.1989).  
3 Once the government presents a *prima facie* case for response costs, the burden shifts to  
4 the defendants to prove the government's response action was inconsistent with the  
5 National Contingency Plan. See *Washington State Dept. of Transp. v. Washington Natural*  
6 *Gas Co.*, 59 F.3d 793, 799-800 (9th Cir.1995); *United States v. Hardage*, 982 F.2d 1436,  
7 1443 (10th Cir.1992).

8 Here, the undisputed evidence demonstrates that plaintiff has met its burden of  
9 proving its *prima facie* case for liability. First, defendants do not dispute that over 70  
10 hazardous substances were detected on defendants' property, which qualifies the property  
11 as a "facility" pursuant to 42 U.S.C. § 9601(9). See Declaration of Barbara J. Cook in  
12 Support of MSA ("Cook Decl."), ¶¶ 7-8. Second, defendants do not dispute that actual  
13 "releases" of hazardous substances occurred on the property. See id. at ¶¶ 9, 12, 14; see  
14 also Declarations of Clifton Davenport ("Davenport Decl.") and Denise Tsuji ("Tsuji Decl.")  
15 in Support of MSA, ¶¶ 10-11 and ¶¶ 10-11, respectively.<sup>3</sup> Third, defendants do not dispute  
16 that they are a liable party, in that they qualify under at least two of the categories of  
17 persons listed in CERCLA as liable persons – either as owners of the facility in question, or  
18 as owners of a facility at which hazardous substances were disposed of at the time of  
19 disposal. These facts are sufficient to satisfy the first, second, and fourth of the above-  
20 listed elements of plaintiff's *prima facie* case.

21 This leaves the third element, which requires plaintiff to prove that it incurred costs in  
22 responding to the release of hazardous substances. Defendants do not dispute that the  
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24 <sup>3</sup> While defendants do not dispute that hazardous substances were either detected  
25 or released on defendants' property, at the hearing on this matter, counsel for defendants did  
26 object that plaintiff's evidentiary proof of these hazardous substances – attached as exhibits  
27 to the Cook and Tsuji Declarations – lack foundation and cannot be authenticated for summary  
28 adjudication purposes. This objection is overruled, as exhibits 1-4 of the Cook Declaration and  
exhibits 1-3 of the Tsuji Declaration are admissible either as public records or reports  
authenticated pursuant to Federal Rule of Evidence 901(b)(7), or as self-authenticating  
documents pursuant to Federal Rule of Evidence 902(4) or (11).

1 government incurred costs, but *do* make the related argument that to the extent that  
2 plaintiff seeks to recover for costs involved in its oversight of the PRP group's remedial  
3 actions regarding the property, these oversight costs are not recoverable. However, as  
4 plaintiff points out, indirect costs, which would include oversight costs, are recoverable  
5 under CERCLA. See U.S. v. W.R. Grace & Co., 429 F.3d 1224, 1250 (9th Cir.  
6 2005)(“administrative and other overhead costs incurred” recoverable under CERCLA),  
7 citing United States v. Dico, 266 F.3d 864, 878 (8th Cir.2001) (also concluding that  
8 “oversight and indirect costs are recoverable in remedial actions under  
9 CERCLA”)(emphasis added).

10 Accordingly, based on the above, and defendants' failure to point to evidence  
11 actually disputing that the above four elements are satisfied, the court concludes that  
12 plaintiff has satisfied its *prima facie* showing for CERCLA liability. The next, and most  
13 significant issues, however, are whether defendants have mounted viable affirmative  
14 defenses to that liability.

15 D. Defenses to Liability

16 Defendants generally raise three affirmative defenses that, if successfully  
17 demonstrated, would negate CERCLA liability. First, defendants assert that the statute of  
18 limitations under CERCLA bars plaintiff's claim for removal costs from the outset. Second,  
19 defendants argue that they are entitled to a defense to liability by reason of a third party act  
20 or omission, as set forth under CERCLA, 42 U.S.C. § 9607(b). Finally, defendants contend  
21 that they are entitled to the innocent landowner defense provided under CERCLA, 42  
22 U.S.C. § 9607(b) and § 9601(35).

23 1. Statute of Limitations

24 Defendants claim – in their seventh, ninth, and tenth affirmative defenses – that no  
25 liability may be imposed for any removal costs that plaintiff seeks, because plaintiff's action  
26 is barred by the relevant statute of limitations.

27 Both parties generally agree on the applicable statute of limitation under CERCLA.

1 Under 42 U.S.C. § 9613(g)(2)(A-B), a plaintiff has three years after completion of the last  
2 removal action on a property, to file a suit to recover removal costs. Id. A plaintiff has six  
3 years after initiation of physical on-site construction regarding a remedial action, to file a  
4 lawsuit to recover remedial costs. Id. However, a plaintiff may seek both removal and  
5 remedial costs in a lawsuit for recovery if remedial action efforts were initiated within three  
6 years after the completion of the last removal efforts, and the lawsuit for recovery of costs  
7 is filed within 6 years of initiation of physical on-site construction regarding the remedial  
8 action. Id.

9 Since the instant action is a suit for recovery of both removal and remedial costs, the  
10 relevant statute of limitations is the latter, and to be timely, this action must have been filed  
11 within 6 years of the initiation of physical on-site construction regarding remedial efforts,  
12 and the remedial efforts must have taken place within 3 years of the completion of the last  
13 removal action. The instant action was filed on August 3, 2005. See Complaint.

14 Despite agreement on the above standard, the parties dispute whether the statute of  
15 limitations applies to bar the instant action. This dispute is rooted in a disagreement as to  
16 which actions on the property are to be classified as remedial in nature, and which are to  
17 be classified as removal actions. Defendants claim that removal efforts occurred on the  
18 site until March 1996 at the latest (at which time the Consent Order between plaintiff and  
19 the PRPs was entered), at which point all actions on the site should be classified as  
20 remedial efforts and actions. And since “physical on-site construction” regarding those  
21 remedial actions on the property did not commence until July 2001, the gap between  
22 removal and remedial on-site construction is greater than the allowable 3 years, and the  
23 action is barred.

24 Plaintiff, by contrast, argues that all actions at the site were removal actions until the  
25 Remedial Action Plan (“RAP”) was approved, in 2000. Only after approval of the RAP in  
26 2000 could the actions on the site become remedial actions and could physical on-site  
27 construction of those remedial actions occur (which plaintiff agrees was in July 2001).

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1 Since plaintiff also asserts that removal actions occurred on several occasions between  
2 1998 and 2000, it argues that the instant suit is not barred by the statute of limitations,  
3 since remedial actions post-RAP would have occurred within 3 years of the last removal  
4 action, and the lawsuit was filed within 6 years of on-site construction regarding those  
5 remedial actions.

6 The applicable case law demonstrates that plaintiff is correct. In California ex rel.  
7 Dep't of Toxic v. Neville Chem., for example, the Ninth Circuit had occasion to consider the  
8 statute of limitations with respect to remedial actions specifically. See 358 F.3d 661, 670  
9 (9th Cir. 2004). The court there explicitly held that the statute of limitations for the filing of a  
10 suit for recovery of remedial action costs under CERCLA does not begin to run until after  
11 final adoption of a remedial action plan. See 358 F.3d at 663. The court also held that "an  
12 action can only be remedial if it is taken after the final remedial action plan is approved...".  
13 See id. at 670. Here, this would mean that until the RAP was approved in August 2000, all  
14 actions on the property were removal actions.<sup>4</sup> See Cook Decl., ¶ 14. Such removal  
15 actions would include, as plaintiff points out, a 1998 Final Soil Removal Action Work Plan,  
16 and a March 2000 Feasibility Study and Remedial Action Plan. See Cook Decl., ¶ 14;  
17 Hanavan Decl., Ex. 14.

18 Defendants attempt to avoid this result by arguing that the court must look to the  
19 nature of the actions undertaken by plaintiff, and that where the actions undertaken are  
20 meant to be permanent in nature and do not represent a short-term action taken to halt an  
21 "immediate risk," the action must be characterized as remedial, even if no RAP has been  
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23 <sup>4</sup> While plaintiff's brief states that the RAP was approved in August 2000, and  
24 defendants appear to concur in their opposition, the court is unable to confirm this fact  
25 affirmatively from review of the evidentiary material. Plaintiff relies on paragraph 14 of the  
26 Cook Declaration for support of this fact, which describes the drafting of the RAP in 2000.  
27 However, that same paragraph fails to confirm an approval date for the RAP, but simply refers  
28 to plaintiff's "approv[al]" of a Remedial Design and Implementation Plan in July 2001. As for  
defendants, they cite to Exhibit 14 of the Hanavan Declaration in Support of Opposition to  
MSA, at pp. 46-47. However, exhibit 14 appears to include only a draft RAP copy, not a final  
approved copy of the RAP. Notwithstanding this discrepancy, however, the court will rely on  
an August 2000 approval date for the RAP, as both parties concede this to be the case.

1 adopted yet. Defendants claim that, since all actions after 1996 were aimed towards  
2 permanent remediation of the property, they should all be characterized as remedial, even  
3 if the RAP was not officially adopted until 2000.

4 The problem with this argument is that it goes against the Ninth Circuit holding in  
5 Neville, which explicitly states that remedial actions can only take place after the RAP is  
6 adopted since, as the court pointed out, parties “could [not] have known before the final  
7 RAP was approved whether any particular construction projects would be ‘consistent with  
8 the final [or permanent] remedy’”. See 358 F.3d at 668. This reasoning makes sense, and  
9 answers defendants’ argument raised above: i.e., although defendants correctly note that a  
10 remedial action can be classified as involving a degree of permanence, one cannot know  
11 whether an action is actually permanent, and therefore remedial, until the RAP has been  
12 approved that makes it so. Hence, the Ninth Circuit – and now, this court’s – use of the  
13 RAP as a bright-line indicator for triggering remedial actions. Indeed, the Neville court even  
14 addressed the concern that its interpretation might make the definition of remedial actions  
15 “superfluous,” but nonetheless held that the statute required this reading. Given the  
16 rationale expressed in Neville, defendants’ arguments, even if appealing, must fail.

17 Moreover, although defendants make an effort to marshal alternative case law in  
18 their support, the cases they rely on are largely district court cases that have no binding  
19 authority. Furthermore, defendants never undertake to truly distinguish Neville, or its  
20 implications, other than to say that Neville did not address the specific question whether  
21 activities preliminary to physical on-site construction of remedial actions constitute remedial  
22 or removal activities. While technically true, this does not address the underlying rationale  
23 noted above, which would seem to categorize activities preliminary to approval of the RAP  
24 as necessarily removal in nature. See also Neville, 358 F.3d at 670 fn. 6.

25 In sum, for all the above reasons, the court determines that all actions prior to the  
26 August 2000 approval of the RAP were removal actions, and those coming afterward,  
27 remedial actions. And since it is undisputed that the 1998 Final Soil Removal Action Work  
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1 Plan and March 2000 Feasibility Study and Remedial Action Plan took place prior to the  
2 August 2000 RAP approval, and that on-site physical construction of remedial actions  
3 commenced in July 2001, the court concludes that: (1) remedial action efforts were  
4 commenced in 2001, following RAP approval, and within three years of completion of the  
5 last removal activities in 1998 and 2000; and (2) the instant action to recover costs was  
6 furthermore filed within 6 years of the initiation of physical on-site construction in 2001.

7 Accordingly, the instant lawsuit for removal costs is not time-barred under  
8 CERCLA's statute of limitations.

9                   2.     Third Party Act or Omission Defense

10 Defendants' third affirmative defense invokes a defense to liability under CERCLA by  
11 reason of a third party act or omission. See 42 U.S.C. § 9607(b). The relevant provision  
12 provides, in part, that no liability will attach to a defendant under CERCLA, where a release  
13 of a hazardous substance is caused solely by "an act or omission of a third party other than  
14 an employee or agent of the defendant, or than one whose act or omission occurs *in*  
15 *connection with a contractual relationship ... with the defendant...*". See id. (emphasis  
16 added). Plaintiff moves for summary adjudication on this defense, pointing out that  
17 defendants were in a contractual relationship with the only third party who could otherwise  
18 acknowledge responsibility for releases at the site, the Bay Area Drum Company.

19 Plaintiff is correct. Defendants contracted with the Bay Area Drum Company for the  
20 purchase of the site in question in 1984, and for a subsequent 5 year lease. See, e.g.,  
21 Declaration of Rose B. Fua in Support of the Motion for Summary Adjudication ("Fua  
22 Decl."), Ex. D-E; see also Declarations of Karl C. Kluck ("Kluck Decl.") and Freud F. Farley  
23 ("Farley Decl."), ¶¶ 4-5 and 5-6, respectively. Accordingly, to the extent that defendants  
24 seek to avoid liability based on any act or omission of the Bay Area Drum Company as a  
25 third party, they cannot do so under CERCLA, owing to the existence of the purchase  
26 agreement in place between them. Defendants not only concede the existence of this  
27 contractual relationship, but fail to submit either argument or evidence in support of the  
28

1 opposite conclusion.

2 As such, the court finds that defendants cannot rely on the third party act or  
3 omission defense provided under CERCLA, in order to avoid liability under the Act.

4 3. Innocent Landowner Defense

5 Finally, defendants' fourth affirmative defense invokes the innocent landowner  
6 defense set forth under CERCLA. See 42 U.S.C. § 9607(b); 42 U.S.C. § 9601(35). This  
7 defense requires defendants to prove, in part, that they both (1) acquired the site in  
8 question "after the disposal or placement of the hazardous substance on ... the [site]"; and  
9 (2) "did not know and had no reason to know that any hazardous substance which is the  
10 subject of the release" was disposed on the property. See 42 U.S.C. § 9601(35).

11 Unlike with defendants' other asserted defenses to liability, there are disputed issues  
12 of triable fact with respect to this particular defense. While it is undisputed that defendants  
13 acquired the property after the initial disposal of hazardous substances on the property and  
14 had no knowledge that any hazardous substance was disposed on the property when they  
15 bought the property, see Kluck and Farley Declarations, ¶¶ 8 and 9 respectively, it is  
16 nonetheless disputed whether defendants *had any reason to know* that any hazardous  
17 substance was disposed on the property.

18 Plaintiff, for example, points to deposition testimony taken from both Kluck and  
19 Farley establishing that defendants were aware the property had been used for drum  
20 reconditioning prior to their purchase, and had seen drums on the property beforehand.  
21 See, e.g., Fua Decl., Ex. B at 80, 83-84; Fua Decl., Ex. C. At 67, 69, 71, 84. Plaintiff also  
22 points to the declaration of a former employee noting that, at the time of purchase, the site  
23 in question had an obvious odor, and visible pools of purplish liquid. See Declaration of  
24 Clifton Davenport in Support of Motion for Summary Adjudication, ¶ 7. Defendants, by  
25 contrast, both state that "[n]o information concerning the toxic conditions on the property  
26 was disclosed through the chain of title or by any posting on the property...". See Kluck  
27 and Farley Decl., ¶¶ 8 and 9 respectively.

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1       The court finds that the above presents a disputed issue of material fact with respect  
2 to whether defendants had any reason to know, at the time they purchased the property,  
3 that any hazardous substances had been deposited on the property. Accordingly, the court  
4 concludes that a determination on the applicability of the innocent landowner defense must  
5 await consideration by the trier of fact.

6       As such, and in view of all the above, the court hereby GRANTS plaintiff's request  
7 for summary adjudication on the issue of defendants' prima facie liability under CERCLA,  
8 and furthermore GRANTS plaintiff's request for summary adjudication as to the applicability  
9 of defendants' third, seventh, ninth, and tenth affirmative defenses. Summary adjudication  
10 is DENIED, however, with respect to defendants' fourth affirmative defense on the issue of  
11 the innocent landowner defense. This issue will proceed to trial, in conjunction with  
12 defendants' remaining affirmative defenses, all of which go to the issue of damages.

13       E.     Rule 56(f) Request

14       In passing, defendants argue that they need an order re-opening discovery under  
15 FRCP 56(f), so that they can obtain information about the exact nature and amount of costs  
16 that plaintiff is asserting have been recovered with respect to its remedial costs. See Opp.  
17 Br. at 19:8-14. Defendants appear to assert that this information is crucial to the summary  
18 adjudication motion before the court, and point out that summary adjudication may not be  
19 granted until the court has ruled on defendants' request.

20       Defendants' request is DENIED. Defendants have not established how the  
21 discovery they seek is relevant to the liability issues that plaintiff has placed before the  
22 court via the instant motion. Indeed, they cannot do so, as the information they seek  
23 through a re-opening of discovery is information that bears on the issue of damages, and  
24 not liability. Moreover, defendants have not established either good cause for the re-  
25 opening of discovery after the close of fact discovery, or even what specific efforts they  
26 have undertaken and failed at in order to secure the discovery they now seek.

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## 1 || F. Conclusion

2 For all the above reasons, the court hereby GRANTS summary adjudication on the  
3 issue of defendants' prima facie liability under CERCLA, and as to defendants' third,  
4 seventh, ninth, and tenth affirmative defenses. Summary adjudication is DENIED with  
5 respect to defendants' fourth affirmative defense on the issue of the innocent landowner  
6 defense, and this issue shall be resolved at trial. All remaining affirmative defenses,  
7 including those relating to due process and double recovery issues such as those raised by  
8 defendants in their opposition brief, shall be resolved as part of the damages issues to be  
9 raised at trial.

10 The parties are furthermore ORDERED to attend a further case management  
11 conference on **November 16, 2006**, at **2:30 p.m.**, in order to set a trial date with respect to  
12 the remaining issues to be tried.

14 | IT IS SO ORDERED.

15 | Dated: October 17, 2006



PHYLLIS J. HAMILTON  
United States District Judge